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Plant Relocation or Partial Termination—The Duty to Decision-Bargain

Cover Page Footnote

Member of the New York Bar.

PLANT RELOCATION OR PARTIAL TERMINATION —THE DUTY TO DECISION-BARGAIN

THOMAS J. SCHWARZ*

I. INTRODUCTION

A. *Scope of the Discussion*

THE exercise of sound business discretion may, under certain conditions, require that an employer move his plant to another location or close down a part of his operation. Whether "removal" or "partial termination" is utilized, the employer must "effect-bargain," *i.e.*, bargain with respect to such items as pensions and severance pay.¹ This duty to bargain² exists irrespective of the employer's motivation in reaching the decision, but if the employer's sole motivation and the foreseeable consequences are to "chill" unionism, his action also constitutes a violation of section 8(a) (3) of the National Labor Relations Act.³

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1. See cases cited notes 7 & 8 *infra*.

2. The duty to bargain is not a duty to reach a decision, but merely to reach an impasse. After impasse, management may unilaterally act. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). Moreover, the Board cannot force management to agree. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

3. 29 U.S.C. § 158(a) (3) (1964), which states: "(a) It shall be an unfair labor practice for an employer—

...
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (emphasis deleted).

See, e.g., *Garwin Corp.*, 153 N.L.R.B. 664 (1965), enforced in part, 374 F.2d 295 (D.C.

Although the foregoing principles are well-established, there exists some uncertainty concerning the employer's duty to bargain over the actual *decision*, motivated solely by economic considerations, to partially terminate or remove. Accordingly, this article will be confined to a discussion of the employer's duty to "decision-bargain."

B. *The Background*

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."⁴ "To bargain collectively" is defined in section 8(d) as: [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession⁵

The underlying question, therefore, is whether removal or partial termination is a "term and condition" of employment, and the question necessitates a degree of historical analysis.⁶

Before the advent of the Act, an employer had unfettered discretion to do as he pleased; its enactment, however, immediately restricted his freedom. The earliest decisions dealing with removal and partial termination upheld his right to remove or partially terminate so long as he bargained with the union over the *effects* of his decision, but there was no duty to bargain over the actual decision itself.⁷ This dichotomy between decision-bargaining and effect-bargaining existed unquestioned:

It is recognized that an employer may lawfully discontinue, reduce, or change its operations for any reason whatsoever, good or bad, sound or unsound, in its sole discretion, and without censorship from the Board, provided only that the employer's action is not motivated by a purpose to interfere with and to defeat its employees' union activities. If the latter purpose is the true purpose, it is unlawful.⁸

Cir. 1967), cert. denied, 395 U.S. 980 (1969); Note, Plant Relocation, 20 Vand. L. Rev. 1062 (1967); 79 Harv. L. Rev. 855 (1966); 64 Mich. L. Rev. 741 (1966). See also *Dlaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954), enforced sub nom. *NLRB v. Tredway*, 222 F.2d 719 (5th Cir. 1955).

4. 29 U.S.C. § 158(a)(5) (1964).

5. *Id.* § 158(d) (emphasis added).

6. For an historical treatment of this subject see Note, Duty to Bargain, 55 Geo. L.J. 879 (1967); Note, Plant Removals, 38 Temp. L.Q. 299 (1965).

7. See, e.g., *Bickford Shoes, Inc.*, 109 N.L.R.B. 1346 (1954); *Brown Truck & Traller Mfg. Co.*, 106 N.L.R.B. 999 (1953); *Rome Prods. Co.*, 77 N.L.R.B. 1217 (1948); *Brown-McLaren Mfg. Co.*, 34 N.L.R.B. 984 (1941). In *California Portland Cement Co.*, 101 N.L.R.B. 1436 (1952), supplemented, 103 N.L.R.B. 1375 (1953), the Board ordered the parties to bargain over an economic removal, notwithstanding the employer's contention that the union had failed to exhaust its remedies under the grievance procedures established by the contract.

8. *Eva-Ray Dress Mfg. Co.*, 88 N.L.R.B. 361, 376 (1950) (Trial Examiner's Report) (footnote omitted), modified per curiam, 191 F.2d 850 (5th Cir. 1951).

Thus the rule appeared to be that an employer could make whatever operational changes he desired without decision-bargaining, so long as he had no anti-union animus. There were, however, prophetic indications to the contrary. In *Gerity Whitaker Co.*⁹ the Board, while not expressly so holding, appeared to require decision-bargaining with respect to a removal. The Board noted:

The removal . . . was such a drastic and crucial change in Gerity Whitaker's employment conditions that the refusal to bargain inherent in such removal, when presented as an accomplished fact, could not be cured by the bargaining that subsequently occurred in regard to the employment at [the new plant] of some employees laid off at [the old plant] especially since the Geritys failed to carry out in full the understanding reached in connection with this negotiation.¹⁰

In other words, the Board was indicating that when the union is presented with a fait accompli as to the decision, effect-bargaining is insufficient.

II. INITIAL INROADS INTO MANAGEMENT PREROGATIVE

In 1960, the Supreme Court decided the landmark case of *Railroad Telegraphers v. Chicago & Northwestern Railway Co.*¹¹ In that case, the union demanded bargaining over a contract provision which would have required union consent before any employment position could be abolished. The provision sought by the union stated: " 'No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization [union].' " ¹² The Court held that the provision related to the employees' "conditions of employment" and, as such, was a proper subject for mandatory collective bargaining.¹³ Although the case was decided under the Norris-LaGuardia Act,¹⁴ it was to have a great effect on the future decisions of the Board. This effect appeared in *Town & Country Manufacturing Co.*,¹⁵ decided by the Board in 1962. Faced with a situation where the employer had unilaterally¹⁶ subcontracted work previously performed by the union, the Board held: "[T]he elimination of unit jobs, albeit for economic reasons,

9. 33 N.L.R.B. 393 (1941), modified per curiam, 137 F.2d 198 (6th Cir. 1942), cert. denied, 318 U.S. 763, rehearing denied, 318 U.S. 801 (1943).

10. 33 N.L.R.B. at 407. The Board ordered reinstatement at either the old or the new plant, but did not order reestablishment of the old plant. Id. at 420.

11. 362 U.S. 330 (1960).

12. Id. at 332.

13. Id. at 336. Mandatory subjects are those which must be bargained over if one party so requests. Permissive subjects may be bargained over if both parties agree. See 2 CCH Lab. L. Rep. ¶ 3020.

14. 29 U.S.C. §§ 101-15 (1964).

15. 136 N.L.R.B. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

16. "Unilaterally" means without having bargained with the union.

is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining."¹⁷

In so deciding, the Board noted that bargaining would not restrain an employer nor obligate him to yield to a union's demand, but would lead to the "candid discussion of mutual problems by labor and management [which] frequently results in their resolution with attendant benefit to both sides."¹⁸ Consequently, "[b]usiness operations may profitably continue and jobs may be preserved."¹⁹

In 1964, the Supreme Court approved *Town & Country* through its decision in *Fibreboard Paper Products Corp. v. NLRB*.²⁰ The issue before the Court was the same as that in *Town & Country*, i.e., subcontracting. The employer had hired an independent contractor to do plant maintenance work which previously had been done by union employees. No change had been made other than this substitution of independent for unit workers. The Court, citing *Railroad Telegraphers*, found that since subcontracting related to the "terms and conditions of employment," there was a duty to decision-bargain. Although the decision was expressly limited to subcontracting, the Court pointed out: "The words [terms and conditions of employment] even more plainly cover *termination of employment* which . . . necessarily results from the contracting out of work . . ."²¹ Enumerating the pertinent facts upon which it based its decision, the Court observed:

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.²²

The Court also indicated that since the Company's subcontracting was directly related to topics traditionally suitable for collective bargaining, there should be an opportunity for discussion of those issues.²³

In a concurring opinion, Justices Stewart, Douglas and Harlan indicated that the majority "most assuredly does not decide that every managerial decision which necessarily terminates an individual's em-

17. 136 N.L.R.B. at 1027.

18. *Id.*

19. *Id.*

20. 379 U.S. 203 (1964). See Smith, Subcontracting and Union Management Legal and Contractual Relations, 17 W. Res. L. Rev. 1272 (1966); Feldesman, How Issues of Subcontracting and Plant Removal Are Handled by the National Labor Relations Board, 19 Ind. & Lab. Rel. Rev. 253 (1966).

21. 379 U.S. at 210 (emphasis added).

22. *Id.* at 213.

23. *Id.* at 215.

ployment is subject to the duty to bargain."²⁴ They further noted that "[d]ecisions concerning the . . . basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect . . . may be necessarily to terminate employment."²⁵

Indeed, *Fibreboard* does not make all forms of unilateral subcontracting unlawful. For example, later Board decisions indicate that no bargaining is required when the subcontracting does not have a significant, detrimental effect on the employees.²⁶

A year after *Fibreboard* the Supreme Court, in *Textile Workers Union v. Darlington Manufacturing Co.*,²⁷ held that an employer has an absolute right to terminate the operation of his entire business, even because of anti-union animus, without violating section 8(a)(3) of the Act. The Court noted that the case did *not* present the question of an employer's right to terminate his business for *non*-discriminatory reasons,²⁸ and further observed:

A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent²⁹

The decision was the result of a balancing of the respective interests of the employer and the union. The Court indicated that while certain business decisions might interfere with the rights of unions, a violation should be found only when the interference outweighed the "business justification for the employer's action."³⁰

Darlington, it should be stressed, dealt with the question of whether an employer violates section 8(a)(3) of the Act when he closes down all

24. *Id.* at 218 (concurring opinion).

25. *Id.* at 223 (concurring opinion).

26. See, e.g., *NLRB v. King Radio Corp.*, 416 F.2d 569 (10th Cir. 1969), cert. denied, 397 U.S. 1007 (1970); *Union Carbide Corp.*, 178 N.L.R.B. No. 81 (Sept. 19, 1969); *Fluorocarbon Co.*, 168 N.L.R.B. No. 85 (Nov. 30, 1967); *American Oil Co.*, 151 N.L.R.B. 421 (1965). Nor is bargaining required when subcontracting is used as a stop-gap measure during a strike. *Puerto Rico Tel. Co. v. NLRB*, 359 F.2d 983 (1st Cir. 1966); *NLRB v. Abbott Pub. Co.*, 331 F.2d 209 (7th Cir. 1964); *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963).

27. 380 U.S. 263 (1965). For a decision prior to *Darlington* holding that an employer cannot totally terminate with anti-union animus, see *Star Baby Co.*, 140 N.L.R.B. 678 (1963), modified, 334 F.2d 601 (2d Cir. 1964). Contra, *N.L.R.B. v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954).

28. 380 U.S. at 269.

29. *Id.* at 270.

30. *Id.* at 269. It is not an automatic violation even if foreseeable consequences may be to chill union activities. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). However, it is improper to partially terminate during an unfair labor practice strike. *Gopher Aviation, Inc.*, 160 N.L.R.B. 1698 (1966), enforcement denied on other grounds, 402 F.2d 176 (8th Cir. 1968).

of his operations because of anti-union animus. It *held* that no section 8(a)(3) violation will occur even if the shut down is discriminatorily motivated. In dictum, however, the Court also indicated that an employer could totally terminate for any reason whatsoever without violating section 8(a)(5). Moreover, insofar as there is less than a total cessation, *Darlington* holds that a partial termination will violate section 8(a)(3) of the Act "if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."³¹ *Darlington* did not deal with a partial termination for purely economic reasons, and the Board has held it to be inapplicable to such a situation.³²

Thus, the outlines of the controversy have been set. *Railroad Telegraphers* states that termination of employment is a mandatory topic of collective bargaining; *Darlington* indicates that an employer has an absolute right to terminate his entire operation; and *Fibreboard* and *Town & Country* hold that a decision to subcontract requires bargaining, impliedly indicating that the "business justification" for subcontracting may not outweigh the interference with the employees' rights. Therefore, based upon the balancing of interests principles of *Darlington* and *Fibreboard*, a requirement of decision-bargaining in cases of economic removal or partial termination should be made only if the interference with the employees' rights outweighs "the business justification for the employer's action."³³

III. TYPICAL CASES

A. *The Board-Court Conflict*

This article might have been entitled "The Courts v. The Board." While there are exceptions, the later cases in the areas of removal and partial termination exhibit a dichotomy depending upon the forum.³⁴ Since the *Town & Country* decision, the Board has consistently held that a failure to decision-bargain in cases of partial termination or removal constitutes a section 8(a)(5) violation.³⁵ The courts, on the other hand,

31. 380 U.S. at 275.

32. See, e.g., *Carmichael Floor Covering Co.*, 155 N.L.R.B. 674 (1965), enforced, 368 F.2d 549 (9th Cir. 1966).

33. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

34. See, e.g., *Cooper Thermometer Co.*, 160 N.L.R.B. 1902 (1966), enforced in part, 376 F.2d 684 (2d Cir. 1967); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619, enforcement denied, 350 F.2d 191 (3d Cir. 1965); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212 (1960), enforced in part, 293 F.2d 170 (2d Cir. 1961).

35. See cases cited note 66 *infra*.

have for the most part refused to require decision-bargaining even after the *Fibreboard* decision.³⁶

The Board's reasoning is logical:

Termination of employment is a proper subject for mandatory collective bargaining;³⁷
partial termination or removal causes termination of employment;
therefore, partial termination or removal is a proper subject for mandatory collective bargaining.³⁸

In other words, it is argued, *Fibreboard* is but one example of action which causes termination of employment. Since the Supreme Court in *Fibreboard* was concerned with termination of employment, other actions which cause such termination should also be mandatory subjects for bargaining.

Examination of a few exemplary cases will aid in clarification. For the purposes of this article, the cases are divided into two groups. In the first group, the employer has no plans to carry on the operation. The second group consists of cases where the employer does intend to continue the operation, but plans to substitute other employees.

B. Group I Cases

In *Royal Plating & Polishing Co.*³⁹ the employer, while engaged in contract negotiations with the union, failed to disclose its intention to close down the plant. The employer signed an agreement with the union and, after laying off a few employees, notified the union of its intention to terminate. The Board affirmed the Trial Examiner's finding that the employer was under a duty to notify the union and negotiate possible alternatives to the partial termination. The Board noted:

Had Respondent consulted with the Union in this case, the latter at least would have

36. The Board and the courts apparently believe that there is very little practical difference between removal and partial termination. From the point of view of the union, both result in termination of employment; from management's point of view, both are operational changes.

37. *Railroad Telegraphers v. Chicago & Nw. Ry.*, 362 U.S. 330 (1960).

38. There is no duty to bargain with respect to a total sale of the business. *Martin Marietta Corp.*, 159 N.L.R.B. 905 (1966). There apparently is such a duty with respect to a partial sale. *Ilfeld Hardware & Furniture Co.*, 157 N.L.R.B. 1401 (1966). If the sale is illusory, however, and the old employer is actually still in control, there is a section 8(a)(3) violation. See generally *American Trailer & Equip. Corp.*, 151 N.L.R.B. 867 (1965); *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. denied, 366 U.S. 909 (1961).

39. 148 N.L.R.B. 545 (1964), on remand, 152 N.L.R.B. 619, enforcement denied, 350 F.2d 191 (3d Cir. 1965), supplemented, 160 N.L.R.B. 990 (1966).

been able to negotiate concerning effects on employees of Respondent's decision to close down the operations Moreover, the Union might have been able to advance a solution to the problems confronting Respondent, however remote that possibility may have been.⁴⁰

After the *Darlington* decision, the court of appeals remanded *Royal Plating* for consideration of *Darlington's* effect on the decision. On remand the Board, citing *Railroad Telegraphers* and *Fibreboard*, held that *Darlington* did not change the result because *Royal Plating* involved a partial termination only.⁴¹ It is interesting to note, however, that one month after *Royal Plating* closed down its first plant, it then terminated its remaining plant. The Board reasoned that because there was no intention to close the second plant at the time that the first was closed, it could not be considered a total cessation. In concluding, the Board, balancing the interests of the respective parties, stated:

[R]espondent did not merely withdraw its capital from the enterprise; Respondent also deprived employees of jobs in which they had invested years of work, had built up seniority rights, and may have had other rights, all of which became relatively worthless upon discontinuance of the operation of the plant.⁴²

The court of appeals was unimpressed and squarely held:

We conclude that an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down.⁴³

While the court noted that this was a failing company, there is no reason to believe that its decision was limited to such a circumstance. It cited the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibreboard*, wherein it was indicated that decisions involving capital investment were not subject to mandatory bargaining. *Royal Plating* would seem, therefore, to be an example of the conflict between the Board and the courts. The Board weighs the rights of the employees as heavily as the capital of the employer and demands bargaining; the courts' scales are tipped by the investment of capital.

One month after the first *Royal Plating* decision, the Board decided *William J. Burns International Detective Agency, Inc.*⁴⁴ The employer in this case lost all but one of the guard contracts in a specific area, and it became economically infeasible to continue the remaining contract. Burns then unilaterally cancelled it. The Trial Examiner and the Board found a section 8(a)(5) violation, but did not discuss whether any solution

40. 148 N.L.R.B. at 547.

41. 152 N.L.R.B. 619 (1965). The Board ordered back pay.

42. Id. at 622-23.

43. NLRB v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965) (footnote omitted).

44. 148 N.L.R.B. 1267 (1964), enforcement denied, 346 F.2d 897 (8th Cir. 1965).

might have resulted from bargaining.⁴⁵ On appeal, the Board argued that *Fibreboard* called for the enforcement of its order.⁴⁶ The court held *Fibreboard* inapplicable, noting that there had been a total cessation of area operations and that no subcontracting was involved. The court found instead that *Darlington* should be applied, quoting: "[A] partial closing is an unfair labor practice under § 8(a) (3) if motivated by a purpose to chill unionism in any of the remaining plants"⁴⁷

Darlington, the court apparently reasoned, meant that without anti-union animus a partial closing could never constitute an unfair labor practice. As previously indicated, however, *Darlington* was specifying the requirements for a section 8(a)(3) (anti-union animus) violation and was not concerned with the duty to bargain specified in section 8(a)(5). Thus the *Burns* court narrowly defined the holding in *Fibreboard* and broadly construed *Darlington* in order to reach its conclusion.⁴⁸

C. Group II Cases

In the Group I cases, as evidenced by *Royal Plating* and *Burns*, the employer did not intend to carry on operations with independent contractors or with new employees at another location. The Group II cases do present these situations.

In *Winn-Dixie Stores, Inc.*⁴⁹ the company, for economic purposes, unilaterally and without any notification to the union closed down a cheese processing facility and contracted to purchase processed cheese. The

45. The Board issued a cease and desist order and, in addition, ordered effect-bargaining, bargaining over the resumption of operations, and back pay. See also *Interstate Tool Co.*, 177 N.L.R.B. No. 107 (June 30, 1969) (back pay and bargaining ordered); *Senco, Inc.*, 177 N.L.R.B. No. 102 (June 30, 1969) (back pay ordered); *Skaggs Drug Centers, Inc.*, 176 N.L.R.B. No. 102 (June 17, 1969) (preferential hiring list ordered); *Apex Linen Serv., Inc.*, 151 N.L.R.B. 305 (1965) (back pay and bargaining ordered).

46. *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897, 901 (8th Cir. 1965).

47. *Id.* at 902.

48. The Eighth Circuit Court of Appeals frequently relies on *Darlington*. In *Adams Dairy Co.*, 137 N.L.R.B. 815 (1962), the Board found a violation of section 8(a)(5) where the employer terminated its distribution operations and gave the work to independent contractors. On appeal, the order was modified. 322 F.2d 553 (8th Cir. 1963). After *Fibreboard*, the judgment of the court was vacated and remanded. 379 U.S. 644 (1965). On remand, the Eighth Circuit Court of Appeals distinguished *Fibreboard*, holding that *Adams* involved a basic operational change and cited *Darlington* as its authority. 350 F.2d 103, 111-12 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). See Comment, *Labor Law: Management Decision to Terminate Delivery Operations Not a Mandatory Collective Bargaining Topic*, 50 Minn. L. Rev. 752 (1966).

49. 147 N.L.R.B. 788 (1964), enforced as modified, 361 F.2d 512 (5th Cir.), cert. denied, 385 U.S. 935 (1966), supplemented, 170 N.L.R.B. No. 198 (April 23, 1968), enforced, 413 F.2d 1008 (5th Cir. 1969). See also *NLRB v. Northwestern Pub. Co.*, 343 F.2d 521 (7th Cir. 1965).

Board held that the action of the employer was in violation of section 8(a)(5) and ordered bargaining over reactivation of the facility. The Board based its finding on the possibility that decision-bargaining might have led to a resolution of the problem wherein not all employees would have been laid off.⁵⁰ The court, discussing the clear economic benefits that accrued to Winn-Dixie by reason of the unilateral partial termination, nevertheless agreed with the Board and held that the processor was performing the same job as the unit employees, necessitating consultation and bargaining with the union.⁵¹ Because of the economic benefits of the partial termination, however, the court held that bargaining over the resumption of the facility would have been useless. Consequently, that portion of the Board's decision which ordered reactivation-bargaining was deleted.⁵²

In *Ozark Trailers, Inc.*,⁵³ the employer⁵⁴ unilaterally closed its Ozark plant, which manufactured truck bodies for its Mobilfreeze plant.⁵⁵ The latter then contracted with an independent company for the manufacture of truck bodies. Thus, as in *Winn-Dixie*, there was a substitution of independent employees for unit workers. The Board, however, treated the case as a partial termination rather than as subcontracting. In balancing the respective interests, it stated:

[T]ermination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective-bargaining framework set out in the Act.⁵⁶

A recent case, *NLRB v. Drapery Manufacturing Co.*,⁵⁷ exhibits very clearly the several disagreements between the Board and the courts. A single integrated employer, for purely economic reasons, unilaterally partially terminated its operations and was planning to contract with another for its requirements. The Board held that there was a section 8(a)(5) violation.⁵⁸ The Eighth Circuit Court of Appeals, with Judge

50. 147 N.L.R.B. at 790.

51. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir.), cert. denied, 385 U.S. 935 (1966).

52. 361 F.2d at 517.

53. 161 N.L.R.B. 561 (1966).

54. The Board held that three corporations constituted one employer. *Id.*

55. See Comment, Labor Law—National Labor Relations Act—Section 8(a)(5) Imposes Duty to Bargain Decision to Close Part of Manufacturing Operation, 36 U. Cinn. L. Rev. 555 (1967); Comment, Labor Law—Employer Must Bargain About an Economically Motivated Decision to Close a Portion of Its Operations, 20 Vand. L. Rev. 932 (1967). See also *McGregor Printing Corp.*, 163 N.L.R.B. 938 (1967); *International Paper Co.*, 150 N.L.R.B. 1252 (1965).

56. 161 N.L.R.B. at 567.

57. 425 F.2d 1026 (8th Cir. 1970).

58. *Drapery Mfg. Co.*, 170 N.L.R.B. No. 199 (April 22, 1968), enforced in part, denied in part, 425 F.2d 1026 (8th Cir. 1970).

(now Justice) Blackmun in the majority, held that there was no duty to bargain. The court distinguished *Fibreboard* by noting that in the instant case there was a capital investment, and the work would no longer be "controlled" by the company. Although the Supreme Court has not yet ruled on this question, Justices Stewart, Douglas, Harlan (concurring in *Fibreboard*), and now Justice Blackmun, all agree that there is no duty to decision-bargain where there is a capital investment, as opposed to mere subcontracting. Assuming, therefore, that one other Justice agrees,⁵⁹ and that none of these four changes his mind,⁶⁰ the Board may ultimately find itself overruled by the Court.

Substitution of employees also takes place where there is a removal of the plant. Instead of substituting an independent contractor, removal substitutes new employees for the old employees.⁶¹ For example, in *McLoughlin Manufacturing Corp.*⁶² the employer, for purely economic reasons, decided to move his plant but failed to notify and bargain with the union. After the move took place, the union filed charges. The Board held that there was a section 8(a)(5) violation but, since the move was irreversible, only ordered bargaining over the effects of the move. Back pay was also ordered.⁶³

A similar decision appears in *Weltronic Co. v. NLRB*.⁶⁴ The employer transferred work to another plant, located three miles away, without written notice to the union and without transferring any employees. The court, citing *Fibreboard* and enforcing the Board's order,⁶⁵ held that "the company had the statutory duty to give the union the opportunity to bargain about the removal . . ."⁶⁶

59. Five Justices joined in the *Fibreboard* majority opinion, of whom only three are still on the Court (one Justice took no part in the decision).

60. Justice Stewart has been known to change his mind. See *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970) (concurring opinion).

61. Unless, of course, the removal is to a nearby location. If this is the case, the same employees might operate the new plant and no section 8(a)(5) problem would arise. Twenty-seven miles, however, is too far. *Cooper Thermometer Co.*, 160 N.L.R.B. 1902 (1966), enforced in part, 376 F.2d 684 (2d Cir. 1967).

62. 182 N.L.R.B. No. 139 (June 1, 1970). See also *McLoughlin Mfg. Corp.*, 164 N.L.R.B. 140 (1967).

63. See also *Plymouth Indus., Inc.*, 177 N.L.R.B. No. 71 (June 30, 1969). Where the removal is a violation, the Board has ordered moving expenses. See *Great Atl. & Pac. Tea Co.*, 141 N.L.R.B. 1 (1963).

64. 419 F.2d 1120 (6th Cir. 1969), cert. denied, 398 U.S. 938 (1970), enforcing 173 N.L.R.B. No. 40 (Oct. 21, 1968). See also *Viking of Minneapolis*, 171 N.L.R.B. No. 7 (June 18, 1968).

65. The Board ordered back pay, but did not require reopening the old plant.

66. 419 F.2d at 1123. The following are also Group II cases: *Dan Dee W. Va. Corp.*, 180 N.L.R.B. No. 80 (Jan. 5, 1970) (employer changed distribution so drivers became independent contractors); *Richland, Inc.*, 180 N.L.R.B. No. 2 (Dec. 15, 1969) (employer sub-

IV. DEFENSES

While no recent cases hold that it is unnecessary to decision-bargain in cases of removal or partial termination, in recent years—perhaps due to the number of court decisions denying enforcement—the Board has begun to withdraw from its decision-bargaining requirement. This new tendency manifests itself in the ease with which the Board finds either a waiver by the union of its rights or a cure by the employer of its violation.

A. *Waiver by the Union*

A waiver by the union can arise either at the time of collective bargaining or at the time of removal or partial termination. The former is more commonplace and appears as a management prerogative clause in the contract. Thus in *Ador Corp.*,⁶⁷ the Board held that there would be no violation of section 8(a)(5) where the collective bargaining clause reserved to management the right to partially terminate.⁶⁸ The management clause, however, must be specific. The clause is ineffective if it merely states that management reserves management rights, for the question then arises as to what constitutes management rights.⁶⁹

contracted without decision-bargaining; Board ordered preferential hiring list and back pay); *Acme Indus. Prod., Inc.*, 180 N.L.R.B. No. 23 (Dec. 15, 1969) (employer moved plant, eliminating twenty or more jobs; Board ordered restoration of seniority); *Atlanta Daily World*, 179 N.L.R.B. No. 166 (Dec. 9, 1969) (employer subcontracted; Board ordered cessation of unlawful conduct and bargaining on subcontractual matters); *Young Motor Truck Serv., Inc.*, 156 N.L.R.B. 661 (1966) (employer refused to bargain concerning decision to sell major portion of business; Board ordered reinstatement, preferential hiring list, back pay and bargaining on decision to close); *International Powder Metallurgy Co.*, 134 N.L.R.B. 1605 (1961) (Board found Company's moving part of plant was evidence of a section 8(a)(5) violation; since move was also accompanied by evidence of bad faith, Board ordered bargaining with employees at new plant); *Sidele Fashions, Inc.*, 133 N.L.R.B. 547 (1961), enforced, 305 F.2d 825 (3d Cir. 1962) (Board found Company was "confronted with a demand by the Union that it sign a new contract which would have increased [the Company's] costs by an amount in excess of its net income for the preceding year." 133 N.L.R.B. at 551. Nevertheless, Board ordered reinstatement at either old or new plant and, if necessary, dismissal of employees engaged at new plant, a preferential hiring list, back pay, and travel and moving expenses). See also *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); Comment, *Duty to Bargain on a Decision to Terminate or Relocate Operations*, 25 Wash. & Lee L. Rev. 96 (1968). For other cases where the courts have enforced the Board's order see, e.g., *Red Cross Drug Co. v. NLRB*, 419 F.2d 1245 (7th Cir. 1969) (employer partially terminated in violation of section 8(a)(5); Board ordered back pay and bargaining); *NLRB v. Sea-Land Serv., Inc.*, 356 F.2d 955 (1st Cir.), cert. denied, 385 U.S. 900 (1966) (duty to decision-bargain).

67. 150 N.L.R.B. 1658 (1965).

68. See also *Druwhit Metal Prods. Co.*, 153 N.L.R.B. 346 (1965).

69. See, e.g., *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969), cert. denied, 398 U.S. 938 (1970). There is no duty to decision-bargain if the decision is made before the advent of the union, *Keller Indus., Inc.*, 170 N.L.R.B. No. 197 (April 23, 1968).

The waiver may also arise by virtue of the union's failure to request bargaining at a time when it is put on notice of management's intent to partially terminate or remove. This is exemplified by *Shell Oil Co.*,⁷⁰ where the employer notified the union of its intent to transfer operations a few days before the transfer. The Board held that the union had waived its right to demand bargaining by failing to request additional meetings at a time when the employer's decision was still revocable. Similarly, in *Hearst Corp. (Daily Mirror)*,⁷¹ the employer, without notice to the unions, closed the *New York Daily Mirror*. The Board first found that there was a violation of section 8(a)(5) resulting from Hearst's unilateral action. Nevertheless, it refused to order reinstatement and restoration of the status quo because the unions did not request it, because contractual settlement agreements had been reached on severance pay and other termination matters, and because Hearst had met its obligation to effect-bargain.⁷²

If the above cases do not clearly show a retreat by the Board, the recent case of *Burns Ford, Inc.*⁷³ does clearly exhibit this tendency. In *Burns*, the employer's sales had declined and, in an effort to decrease losses, it terminated employment with a week's notice. The union filed a section 8(a)(5) charge. The Trial Examiner found that the notice merely evidenced a fait accompli.⁷⁴ The Board, however, disagreed:

The decision to lay off employees was made about a week before April 16. Thereafter, the number of employees to be laid off, and the method of their selection, was determined, and the employees and the Union were then informed, on April 16 . . . [T]he announcement [was not] a fait accompli, since it was not to take effect for another week.⁷⁵

The Board then indicated that, since there was a week before the layoffs became effective, there was ample time to bargain and the union had been lax in not so requesting.

It would appear that *Burns* is a prime example of the Board's withdrawal from its prior requirement of decision-bargaining. As the Board

70. 149 N.L.R.B. 305 (1964).

71. 151 N.L.R.B. 834 (1965).

72. Id. at 841-42. See *United States Lingerie Corp.*, 170 N.L.R.B. No. 77 (March 26, 1968) (union failed to request and therefore waived right to bargain with respect to impending relocation when its representative saw employer's machines being dismantled); *Edward Axel Roffman Assoc.*, 147 N.L.R.B. 717 (1964) (union waived right to bargain over decision to relocate when it ignored employer's notification of possibility of move). See also *NLRB v. Spun-Jee Corp.*, 385 F.2d 379 (2d Cir. 1967); *White Consol. Indus., Inc.*, 154 N.L.R.B. 1593 (1965); *Lori-Ann of Miami, Inc.*, 137 N.L.R.B. 1099 (1962); *Montgomery Ward & Co.*, 137 N.L.R.B. 418 (1962).

73. 182 N.L.R.B. No. 113 (May 26, 1970), 5 CCH Lab. L. Rep. ¶ 21,936.

74. See 5 CCH Lab. L. Rep. ¶ 21,936, at 28,193.

75. Id. (emphasis added).

itself stated, the "decision" to lay off "was made," and even the "number" and "method of selection" was determined. It is difficult to understand what was left to be discussed had the unions not been tardy. Indeed, even if the union had immediately demanded bargaining, the probability is great that nothing could have been accomplished.

The retrogressive direction of the *Burns* case becomes even clearer when it is compared with the 1941 decision in *Gerity Whitaker Co.*⁷⁶ The Board in that case held that when a decision was "presented as an accomplished fact [it] could not be cured by the bargaining that subsequently occurred in regard to [future] employment . . . of some employees . . ."⁷⁷ If a violation cannot be cured by subsequent bargaining, it is difficult to comprehend how it can be waived by a union's delay.

B. Cure by the Employer

Just as the Board has held that a union may waive its rights, so it has decided that an employer may cure his breach. Thus, in *Hartmann Luggage Co.*,⁷⁸ the employer entered into a subcontracting agreement but bargained with the union while the contract was still executory. The Board concluded that if the union had dissuaded the employer from his impending decision, the employer would not have been required to adhere to the executory contract. The employer bargained in good faith on every issue requested by the union, whose primary concern was the effect of subcontracting rather than the actual decision itself.⁷⁹ The case, therefore, would indicate both a cure by the employer and a waiver by the union.

To cure a pending violation, however, an employer must bargain in good faith to impasse, after which he may carry out his plan.⁸⁰ The employer cannot conceal his true intentions,⁸¹ and must supply the union with all relevant cost, efficiency and feasibility studies related to the proposed operational change.⁸²

V. POTENTIAL SOLUTIONS

Various solutions to the conflict between the Board and the courts have been offered but thus far none has been adopted. It would seem, there-

76. 33 N.L.R.B. 393 (1941), modified per curiam, 137 F.2d 198 (6th Cir. 1942), cert. denied, 318 U.S. 763, rehearing denied, 318 U.S. 801 (1943).

77. *Id.* at 407. For similar waiver cases recently decided, see *Gladwin Indus., Inc.*, 183 N.L.R.B. No. 36 (June 12, 1970); *Green Constr. Co.*, 180 N.L.R.B. No. 85 (Jan. 7, 1970).

78. 145 N.L.R.B. 1572 (1964).

79. See also *Southern Cal. Stationers*, 162 N.L.R.B. 1517 (1967).

80. See, e.g., *Assonet Trucking Co.*, 156 N.L.R.B. 350 (1965). In this case the employer unlawfully terminated a night shift, and the Board ordered reinstatement with back pay.

81. See *Sidele Fashions, Inc.*, 133 N.L.R.B. 547 (1961), enforced per curiam, 305 F.2d 825 (3d Cir. 1962); *Royal Optical Mfg. Co.*, 135 N.L.R.B. 64 (1962); *Mount Hope Finishing Co.*, 106 N.L.R.B. 480 (1953), rev'd on other grounds, 211 F.2d 365 (4th Cir. 1954).

82. *Keller Indus., Inc.*, 170 N.L.R.B. No. 197 (April 23, 1968).

fore, that unless the Board is merely to find a "waiver" or a "cure" whenever it does not wish to require bargaining, a resolution of the problem is in order. Solutions which have previously been proposed are discussed in this section.

A. *The Pseudo-Solutions.*

1. The Management Prerogative Solution

This solution is actually a restatement of the courts' point of view. Briefly, it proposes that the conflict between the courts and the Board be resolved by simply not requiring decision-bargaining at all. As has been pointed out by a former Assistant General Counsel for the Board, management's argument is that the requirement of bargaining is futile: that efficiency, strategy and policy are the sole responsibility of management.⁸³

Another commentator has stated:

The requirement of advance notification to and discussion with the union inevitably slows action, and delay itself may block the change. The possibility that confidential plans, like those for a plant relocation, may become public information may make the contemplated action impractical. More important, such advance discussion effectively opens the possibility to the union of blocking, delaying, or modifying the contemplated action by threat or use of economic pressure. . . . Concessions and compromises may be made which would not otherwise be made. From the immediate viewpoint of the affected employees and the union, of course, such ability to forestall action is exactly the effect desired, but it must be recognized that it restricts the ability of the individual enterprise to achieve optimum operating results and the ability of the economy as a whole to adjust to changing conditions.

Thus, a union which is interested in fully exploiting the possibilities of the Board's new doctrine may be able to elevate its status to that of a co-manager whose views and proposals must be solicited and considered in connection with every decision which might affect the employment relationship.⁸⁴

Still another writer, a former chairman of the Board, suggests that the requirement of decision-bargaining runs counter to the purpose of collective bargaining. He notes:

Logically and in fact actually every business decision of any substance will directly or indirectly affect employee welfare. Decisions as to what to produce, how to finance the company, whether a company should expand, and, if so, into what fields, what to invest in research and what dividends should be paid to stockholders, the price of the product, are decisions traditionally entrusted to owners and managers, but their individual and cumulative effects on employee welfare cannot be gainsaid.⁸⁵

83. Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 Lab. L.J. 143 (1968). See also Loomis & Herman, *Management's Reserved Rights and the NLRB—An Employer's View*, 19 Lab. L.J. 695 (1968).

84. Goetz, *The Duty to Bargain About Changes in Operations*, 1964 Duke L.J. 1, 9-10.

85. Farmer, *Bargaining Requirements in Connection with Subcontracting, Plant Removal, Sale of Business, Merger and Consolidation*, 14 Lab. L.J. 957, 960 (1963).

The author then concludes:

The hallmark of a strong economy is its adaptability to an ever-changing economic world. The paralysis and apparent inhibition on decision-making evident in the railroad industry are at odds with the national goal of productive growth in an increasingly competitive world market.⁸⁶

While these pseudo-solutions, or criticisms as they really are, do have some validity, they are neither pragmatic nor timely. Surely employees who devote their careers to an employer should not be dismissed at the sole discretion of that employer. Stability of labor relations would in no manner be aided by a regression, for the time has long since passed when management could make decisions without consulting the union. It appears somewhat incongruous to permit unions to bargain over wages but not over plant removal. Wage-bargaining becomes somewhat of a nullity when there is no employer to pay the wages.⁸⁷ Management has lived successfully with *Fibreboard*, and it can learn to live with bargaining over other issues.⁸⁸ Allowing management an unfettered right is contrary to the purpose of the National Labor Relations Act and disregards the necessary balancing of interests which the Supreme Court has ordered.⁸⁹

2. The Union Equality Solution

While the previous solution suggests that management have a free hand, unions have urged that they be consulted on all issues which affect employment. This has been the position of the Board with respect to partial termination or removal and has often proved to be an exercise in futility. Employees are not skilled in the management of a business. They are essentially a medium for obtaining the goals of their employer, and they should not have the unrestrained right to block managerial decisions inherent in permitting them to require bargaining on all business questions. Such a requirement would certainly impede production. The alternative, however, is *not* to preclude decision-bargaining. A happy medium and a balancing of interests must be reached.

86. *Id.* at 967.

87. It has been argued that the collective bargaining agreement itself impliedly prohibits removal. See Comment, Labor Agreements—Implied Limitations on Plant Removal and Relocation, 1965 Duke L.J. 546 (and cases cited therein).

88. It has, however, been suggested that decision-bargaining might imperil the collective bargaining process. Adams & Coleman, Can Collective Bargaining Survive the Board?, 52 Geo. L.J. 366 (1964). For a discussion of how the duty to decision-bargain is fulfilled, see Sigal, The Evolving Duty to Bargain, 52 Geo. L.J. 379 (1964).

89. See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

B. *Alternative Solutions*

1. The Limited Duty Solution

Because of the negative effects that decision-bargaining may have on the production process, it has been urged that the bargaining requirement be limited.⁹⁰ Thus it has been suggested:

[T]he employer's duty to bargain should be satisfied by a reasonable period of frank discussion with a union fully informed of the existing economic factors, without the need to proceed to impasse; after discussion the employer should be free to undertake all measures necessary for efficient relocation. This result could also be reached by sympathetic administration of the rules for determining what constitutes an impasse in bargaining about relocation in cases where the employer actively seeks to relocate; ordinary rules could still be applied to regular bargaining sessions, since prolonged discussion would then create no unusual hardship.⁹¹

During this period of limited bargaining, it is suggested, the employer would be prohibited from contracting for relocation.⁹²

This limited duty is really nothing more than an abolition of any decision-bargaining. The only restriction on the employer is that he is not permitted to make arrangements for relocation during the period of limited bargaining. He need only move up the timetable for the limited bargaining and, once that technicality is passed, relocation may begin. The union is completely without remedy as the employer does not have to accept even beneficial solutions. In other words, only effect-bargaining would be required. Thus the limited duty solution actually offers no more hope for a resolution of the Board-court conflict than do the pseudo-solutions previously discussed.

2. The Capital Investment Solution

This solution proposes that where the contemplated change involves an investment or a withdrawal of capital, only effect-bargaining should be required.⁹³ It apparently has its genesis in the *Fibreboard* decision, where the Court noted that "[n]o capital investment was contemplated"⁹⁴ by the change and, as indicated previously, may one day become the law of the land if the Supreme Court is given the opportunity to decide the issue. However, as the author admits, "[t]he line between 'employ-

90. See Note, Labor Law Problems in Plant Relocation, 77 Harv. L. Rev. 1100, 1103-06 (1964).

91. Id. at 1104-05.

92. Id. at 1105.

93. See Comment, Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions, 64 Colum. L. Rev. 294 (1964).

94. 379 U.S. at 213.

ment' and 'investment' decisions may often be obscure.⁹⁵ This obscurity would make for complicated bargaining. The union would argue that the decision involved no capital investment, while the employer could easily invest capital for the sole purpose of meeting this requirement.

Assuming, however, that a line could be drawn, the employees' rights would not be safeguarded. The more the employer spent, the less strength the union would have. Large corporations could rid themselves of unions while small companies would be required to bargain instead of investing capital.

Even assuming good faith on the part of the employers, the investment of capital should not be used as a means to curtail employee rights. While it is true that employers invest capital, employees often invest their lives in a trade or company. One man's livelihood should be as valuable as another man's capital.

3. The Advanced Planning Solution

The advanced planning solution is, in theory, quite simple. When the parties negotiate the collective bargaining agreement they should, according to this solution, negotiate their respective obligations concerning removal or partial termination. If this were possible, no mid-contractual problems would arise.⁹⁶ The solution, however, may be impractical. Bargaining is extremely difficult when neither party knows the actualities of the situation. The union cannot present alternative solutions to the employer when it does not know the employer's intentions. Moreover, problems arise during the course of the contract that are unforeseeable. The employer may find a mid-contractual need to remove, or there may be a sudden decrease in the sale of a product which calls for a partial termination. Such problems, because they are unforeseeable, cannot be bargained over. On the other hand, the union may feel that it has more leverage at the time of contract negotiations than it might have in the future. Consequently, it should demand protection against a removal or a partial termination. The protection, however, will most likely be limited to some amount of severance pay and, as a result (except for the presence of other contractual provisions), the union will have sold its right to decision-bargain.

Thus, the only real solutions that can be reached at the time of contractual negotiations are either a specific management prerogative clause with a predetermined amount of severance pay or a specific clause im-

95. Comment, *supra* note 93, at 313.

96. See Comment, *The Duty to Bargain Before Implementing Business Decisions*, 54 *Calif. L. Rev.* 1749 (1966); Comment, *Changes in Employer Structure and Operations and Their Effect on Collective Bargaining Rights*, 15 *De Paul L. Rev.* 117, 130 (1965).

posing a duty to bargain. These solutions in actuality are nothing more than a waiver by the union⁹⁷ or a written agreement to do what the Board already requires. Thus, unfortunately, this solution is in reality not much of a solution at all.

4. The Relevancy Test Solution

The relevancy test solution would require bargaining only when the employer's motivation for the operational change is relevant to the union.⁹⁸ If the employer terminated for lack of product demand bargaining would be ineffective and hence unnecessary. If, however, cost efficiency was the motivation, the union might be able to reduce costs and hence bargaining would be required.⁹⁹

To require bargaining only where it can accomplish something would appear to be a logical solution. As has been pointed out, however, "it may not be clear which factors underlie a particular decision [and,] [c]onsequently, bargaining should be required where it is possible that labor costs or related matters are involved."¹⁰⁰ While it is true that impasse might be quickly reached if labor costs or related matters were not involved, the problem would be to define "related matters." Assume, for example, that the motivation for the termination of the plant is a decline in demand for the product. Under this solution, bargaining would not be required. It is possible, however, that if labor costs were lowered the price of the product could also be lowered, thereby increasing demand. Business decisions are infrequently based upon one factor alone. For example, in *Sucesion Mario Mercado E Hijos*,¹⁰¹ the employer unilaterally shut down and subcontracted because of mechanical difficulties. The Board dismissed a complaint alleging violation of section 8(a)(5) because "the factors which led to the [employer's] decisions to subcontract and to terminate . . . are not 'peculiarly suitable for resolution within the collective bargaining framework.'"¹⁰² While the decision is correct, Board pro-

97. See text accompanying notes 67-77 *supra*.

98. See Comment, *The Scope of Collective Bargaining*, 74 Yale L.J. 1472 (1965). See also Comment, *The Development of the Fibreboard Doctrine: The Duty to Bargain Over Economically Motivated Subcontracting Decisions*, 33 U. Chi. L. Rev. 315 (1966).

99. See Comment, *The Scope of Collective Bargaining*, 74 Yale L.J. 1472, 1478 (1965). For a view that plant removal based purely on wage considerations is a violation of section 8(a)(3), see Sheinkman, *Plant Removal Under the National Labor Relations Act: Can Bargaining Be Avoided and Should Bargaining Be Avoided?*, 16 N.Y.U. Conf. on Lab. 81 (1963).

100. Comment, *supra* note 99, at 1478.

101. 161 N.L.R.B. 696 (1966). See also *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969) (termination for economic reasons); *A.C. Rochat Co.*, 163 N.L.R.B. 421 (1967) (partial termination due to religious motivation).

102. 161 N.L.R.B. at 699-700 (quoting *Fibreboard*).

ceedings were required to establish the fact that the union was incapable of assisting management in its problem. Since it is the union's duty to protect the jobs of its members,¹⁰³ it will file an unfair labor practice charge if there is any possibility that the decision may be related to labor matters. Indeed, it should file even where there is no such possibility for it may bring about a more beneficial severance agreement.

Thus, while this solution is logical, it would breed litigation and uncertainty.¹⁰⁴ What is required is a solution under which both parties can predetermine whether decision-bargaining is required.

VI. A PROPOSED APPROACH

The present Board solution is to require decision-bargaining in practically all cases of removal or partial termination unless there has been a waiver by the union. Management argues that this impedes production and can have no beneficial effect when the motivation is other than labor related. Unions, on the other hand, argue that it is their duty to protect the jobs of their members.¹⁰⁵ A solution is thus required that includes the relevancy test¹⁰⁶ but allows for a predetermination by the parties that bargaining is required. Of course, no solution can be propounded that will bring success in every situation. As the Supreme Court has indicated, however, a solution which forces the parties to proceed voluntarily without direct Board pressure is desirable.¹⁰⁷ Such a solution can be found by taking a middle ground between the positions of the Board and the courts.

Decision-bargaining should be required in all cases where the employer plans to substitute non-unit workers for unit workers. Thus, bargaining would always be required where there is a removal in the offing. In cases of partial termination bargaining would be required only when the employer planned to purchase the goods or services previously being produced by the unit employees from independent contractors or from another company. The employer would always have to notify the union of the impending change and give it sufficient information to show whether or not a substitution was planned.¹⁰⁸

103. Platt, *supra* note 83, at 144.

104. See Adelstein, *The Role of Collective Bargaining in Decisions to Change Operations*, 17 W. Res. L. Rev. 1221, 1250-52 (1966).

105. See Platt, *supra* note 83, at 144.

106. See text accompanying note 98 *supra*.

107. Cf. *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

108. "Planned" means planned at the time of the removal or partial termination. However, the employer should not be allowed to circumvent the solution by waiting a short period of time before making a substitution. In all cases, of course, the employer would have to effect-bargain.

An example will clarify the solution:

Jones, Inc. (the employer) produces fork lifts for use in heavy industry. The company owns four plants which manufacture bodies, engines, tires and automatic transmissions respectively. For purely economic reasons the employer decides the following changes are necessary:

(a) The plant which manufactures the engines will be moved to South Carolina, and the engines will be shipped to the assembly point. Since this substitutes South Carolina workers for unit workers bargaining will be required. The same result would occur if the employer moved its entire operation to South Carolina.¹⁰⁹

(b) The plant which manufactures the tires will be terminated, and tires will be purchased from Goodyear, Inc. Bargaining will be required in this situation also because Goodyear employees are being substituted for the employer's unit employees.

(c) The plant which manufactures automatic transmissions will be closed down and automatic transmissions will no longer be offered as optional equipment on the fork lifts. No bargaining will be required because no substitution of employees will occur. The same result would occur if the employer decided to terminate its entire operation and go out of business.¹¹⁰

Bargaining in the above situations should present no new difficulties to the employer. In fact, the employer will be relieved of the duty to bargain where no substitution of employees is planned. Moreover, bargaining in cases involving substitution is really no different from bargaining in cases of subcontracting. There seems to be very little logical difference between *Fibreboard* (subcontracting) and removal or partial termination with substitution. What distinction can be made, from the point of view of the employee, whether the substitute employees appear because of subcontracting or removal or partial termination? Indeed, the line of distinction between partial termination and subcontracting is at best obscure. For example, is it subcontracting or partial termination when the employer gives unit work to outside employees, causing an indefinite layoff of the unit workers?

From the employer's point of view, there may be a distinction between

109. If the employer's decision to move were non-labor motivated (e.g., lack of sufficient electric power), bargaining would be both required and ineffective. In such a circumstance, therefore, labor would gain nothing from the required bargaining.

110. If the transmissions were being discontinued because of high labor costs, bargaining would not be required but might be effective. As indicated before, however, no solution will be a panacea. Pragmatically, it is believed that the proposed approach will result in the broadest possible application and success.

subcontracting and removal or partial termination with substitution. The motivation, however, is the same: efficiency. If management disagrees with this solution, it should at least recognize that the solution is in fact relatively less extreme than the Board's position for it eliminates bargaining where there is no substitution. To require no decision-bargaining at all is contrary to the policy of the National Labor Relations Act. At the same time, labor should realize that the purpose of the Act is to grant workers a right rather than to disable employers.

It is submitted that this solution is consistent not only with the purposes of the Act, but also with *Fibreboard* and *Darlington*. Decisions which concern "the basic scope of the enterprise,"¹¹¹ that is, whether or not to go out of business (*Darlington*) or partially go out of business, will still not be within the scope of the bargaining duty. At the same time, where these decisions cause a detrimental effect on the union workers and where the union may be able to dissuade the employer (*Fibreboard*), bargaining will be required. An equitable balancing of interests will have been approached.

VII. CONCLUSION

As stated so eloquently by John Kenneth Galbraith: "The first requisite for survival by the technostucture is that it preserve the autonomy on which its decision-making power depends."¹¹² Autonomy, however, like every other requisite, must be guided by the needs of society. One of these needs is the preservation of jobs and the certainty of income. Where decisions are rendered, whether by the Board or the courts, without regard to the respective interests of both management and unions, neither side is well served. Thus the Board-court conflict which exists today makes nobody happy. Only a solution which balances the interests of both management and labor can produce the tranquil and progressive economy which is the goal of the National Labor Relations Act. It is submitted that in cases of removal or partial termination, requiring decision-bargaining only where there is a substitution of employees carries out that purpose.

111. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 225 (1964) (Stewart, J., concurring).

112. J. Galbraith, *The New Industrial State* 167 (1967).